No. 13734

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

THE ALBERTSON COMPANY, a corporation,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR THE ALBERTSON COMPANY, APPELLEE.

FILED

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Jurisdiction.

This appeal involves federal income and personal holding company taxes for the years 1944 and 1945. The taxes in dispute were paid on or about September 16, 1947. Claims for refund were filed on or about September 6, 1949, and were rejected by notice dated July 10, 1950. Within the time provided in section 3772 of the Internal Revenue Code and on July 25, 1950, the taxpayer brought an action in the District Court for recovery of the taxes paid. [R. 41-42.] Jurisdiction was conferred on the District Court by 28 U. S. C., section 1346. The judgment was entered on October 8, 1952. [R. 58-59.] Within sixty days and on December 5, 1952, a notice of appeal was filed. [R. 60.] Jurisdiction is conferred on this Court by 28 U. S. C., section 1291.

Opinion Below.

The District Court wrote no formal opinion in this case.

Question Presented.

Whether, in determining gain or loss under section 111 of the Internal Revenue Code on the sale of certain real property in 1944 and 1945, The Albertson Company, hereinafter referred to as the taxpayer, may include in the cost, or unadjusted basis, of such property within the meaning of section 113(a) certain taxes (then a lien on such property) and other charges, which were paid by the taxpayer when it purchased the property in 1923 through 1928, and for which the taxpayer took deductions on its tax returns which were allowed by the Commissioner in determining the taxpayer's taxable net income for such prior years.

Summary of the Facts.

The facts in this case were stipulated. [R. 31-42.]

The taxpayer is a corporation organized under the laws of the State of California and maintaining its principal place of business in Los Angeles. During 1923, 1924, 1926, 1927 and 1928, the taxpayer purchased, or otherwise acquired, certain real property in Los Angeles and in Beverly Hills, California. At the time of acquisition, each of the properties was subject to a lien for real property taxes. In acquiring the property the taxpayer incurred additional costs in connection therewith such as escrow fees, deed recording fees, lighting assessments, commissions, title policy fees, and improvement assessments. The taxes and other charges were paid by the taxpayer at or after the respective dates of acquisition of the properties. [R. 31-36.]

In computing its federal income taxes for the years of acquisition, the taxpayer deducted the above-mentioned payments from its gross income and such deductions were allowed by the Commissioner of Internal Revenue with tax benefits resulting to the taxpayer. [R. 37.]

In 1944 and 1945, the taxpayer sold the real property purchased between 1923 and 1928. [R. 32-37.] In determining the "adjusted basis" of such property, the taxpayer included all of the above-mentioned taxes, escrow fees, deed recording fees, lighting assessments, commissions, title policy fees and improvement assessments in its cost (unadjusted basis) of such property. [R. 4.] Upon examination of the taxpayer's corporation income and personal holding company tax returns for 1944 and 1945, the Commissioner of Internal Revenue determined that the taxpayer could not include the above-mentioned items in its cost (unadjusted basis) of the property sold during 1944 and 1945, and assessed additional income taxes and personal holding company surtaxes against the taxpayer for such years in the total amount of $5,662.95, together with interest thereon. The taxpayer paid the asssessments, filed claims for refund and, upon the disallowance thereof, brought this action for their recovery. [R. 41-42.]

Summary of Argument.

Section 111(a) of the Internal Revenue Code requires that the gain or loss from the sale or other disposition of property be determined by reference to the adjusted basis of the property. Adjusted basis is defined by section 113(b) of the Internal Revenue Code. That section provides that adjusted basis shall be the basis determined under section 113(a) of the Internal Revenue Code, adjusted as provided in the subsections of section 113(b). Section 113(a) of the Internal Revenue Code provides that the basis of property shall, with certain exceptions not here in issue, be the cost of such property.

The pleadings allege and admit, and the stipulation of facts discloses, that the taxpayer included in the cost of the properties sold in 1944 and 1945 the taxes and other charges for which it had claimed deductions in the prior years of purchase and payment, and which deductions had been allowed by the Commissioner of Internal Revenue. Said taxes and other charges were a part of the cost, or unadjusted basis, of the properties. The deduction by taxpayer of said amounts, and the allowance thereof by the Commissioner of Internal Revenue, were the result of a mutual mistake of law. Said deductions were not adjustments to basis under section 113(b) of the Internal Revenue Code, or any subsection thereof.

ARGUMENT.

In the Determination of Gain or Loss on the Sale by Taxpayer of Real Property in 1944 and 1945 the Taxpayer was Entitled to Include and Must Include in the Cost or Unadjusted Basis Thereof Taxes and Other Amounts Which Were Paid by the Taxpayer When it Purchased the Several Properties in 1923 Through 1928, Notwithstanding the Fact That Deductions for Said Amounts Were Claimed and Allowed in Determining the Taxpayer's Net Income for Such Prior Years.

Section 111 of the Internal Revenue Code (see appendix of applicable statutory provisions at the conclusion of this brief) provides that the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and that the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

Section 113 of the Internal Revenue Code is entitled "Adjusted Basis for Determining Gain or Loss." Section 113(a) provides that, with certain exceptions not in issue or in controversy in this case, the basis of property shall be the cost of such property. Section 113(b) then defines adjusted basis as being "the basis determined under subsection (a), adjusted as hereinafter provided."

Under these sections, the taxpayer, in determining the gain or loss from the sales in question, was first required to determine cost, or unadjusted basis, under section 113(a). The next step was to make any required adjustments to that cost, or unadjusted basis. Once any such required adjustments were made, the gain or loss was mathematically determinable by reference to the sale price.

Paragraph III of the taxpayer's complaint [R. 4] alleges in part that

> "In computing the adjusted basis for determining gain or loss from the sales of these properties the plaintiff included *as a part of the cost of said properties,* taxes paid by the plaintiff which were a lien on said properties at the time they were acquired and escrow fees, recording costs and other related expenses paid by the plaintiff as set forth fully in the plaintiff's claims for refund * * *." (Emphasis added.)

Paragraph III of the appellant's answer [R. 28]:

> "Admits the allegations contained in Paragraph III [of the complaint], except that each and every allegation contained in the plaintiff's claims for refund attached to the complaint of the plaintiff, as Exhibits 'A,' 'B,' and 'C,' is specifically denied except those that are admitted in this answer."

In Paragraphs IV, VI, VIII, X, XII, and XIII of the stipulation of facts [R. 32-37] it is stipulated that in computing the gain or loss from the sales therein described, the taxpayer included said taxes and other charges in the *unadjusted* basis of said properties. Thus the pleadings and the stipulation of facts clearly state that the taxes and other charges giving rise to the present controversy were included in the *cost,* or unadjusted basis, of the properties under section 113(a) of the Internal Revenue Code.

The appellant's fundamental error, which error pervades its argument and renders its position without merit, is in its contention that the taxes and other charges were adjustments to basis under section 113(b)(1)(A) of the Internal Revenue Code. The appellant's argument is that the "but" clause of section 113(b)(1)(A) forbids the inclusion of the taxes and other charges in the "adjusted basis." This constitutes a misconception of the issue. Since the pleadings and stipulated facts clearly and definitely establish that the taxes and other charges in question were included in *cost* under section 113(a), and were not *adjustments to cost* under section 113(b), the entire argument of the appellant is misdirected and fails to meet the issue. In short, the appellant has presented no argument to this Court on the real issue. It would seem that its appeal must fail for that reason alone.

The situation presented in this case is, simply stated, this: In the years 1923 through 1928, the taxpayer purchased, or otherwise acquired, parcels of real property which, at the time of acquisition, were subject to tax liens. In addition, it paid escrow fees, title policy fees, and other obligations connected with the acquisition of said properties. The taxes were, in accordance with general practice, prorated to the date of closing of the escrows, so that the economic burden thereof fell upon the vendors up to the date of closing of escrow and upon the taxpayer from that time forward. The taxpayer deducted the portion of the taxes which it so paid, as well as the escrow fees, title fees, and other charges. The fact of the taking of these deductions was not withheld from the Commissioner of Internal Revenue, but, on the contrary, was well known to him and was accepted by him. [R. 38-40.] This, presumably, was in accordance with then accepted practice, notwithstanding that under the law, as subsequently interpreted by the United States Supreme Court, the taxes and other charges in question were not deductible items. In the taxable years here in question, 1944 and 1945, the properties referred to were sold. In determining its gains and losses, the taxpayer included the taxes and other charges above referred to in the cost or unadjusted basis. The Commissioner of Internal Revenue contests the taxpayer's right so to include said taxes and other charges.

It is well settled law that the payment by a purchaser of taxes which are a lien on property at the time of the purchase is a capital expenditure, not deductible by him, and that such payment is a part of the cost or purchase price of the property. This principle would seem to have been settled beyond any question by the decision of the United States Supreme Court in *Magruder v. Supplee* (1942), 316 U. S. 394. In that case the facts were as follows: Supplee, the taxpayer, had purchased various parcels of real property in Baltimore, Maryland, in 1936 and 1937. State and city real property taxes for the years of the purchase constituted a lien on the properties at the time of the purchase, but had not become payable at that date. The purchase contract provided for apportionment of said taxes, the purchaser, Supplee, agreeing to pay the portion allocable to the period subsequent to his acquisition. Supplee deducted in his 1936 and 1937 income tax returns the taxes allocable to the period following the purchase. Said deduction was claimed under section 23(c) of the Revenue Act of 1936, which allowed a deduction for "taxes paid or accrued within the taxable year."

The Commissioner of Internal Revenue ruled that said amounts were not deductible by Supplee. The United

States District Court held that the amounts were deductible, and on appeal by the Commissioner, the United States Court of Appeals for the Fourth Circuit affirmed. The Supreme Court granted certiorari, and reversed the Court of Appeals. It held, with the Commissioner, that the amounts in question were not properly deductible by Supplee. The Court said in part (316 U. S. 399):

> "Thus either a pre-existing tax lien or personal liability for the taxes on the part of a vendor is sufficient to foreclose a subsequent purchaser, who pays the amount necessary to discharge the tax liability, from deducting such payment as a 'tax paid.' Where both lien and personal liability coincide, as here, there can be no other conclusion than that the taxes were imposed on the vendors. Respondents simply paid their vendors' taxes; they cannot deduct the amounts or any portion thereof, paid to discharge liabilities so firmly fixed against their predecessors in title by the laws of Maryland."

In its opinion, the Court quoted, with approval, the following statement of Judge Parker, dissenting in *Commissioner v. Rust's Estate* (C. A. 4, 1940), 116 F. 2d 636, 641:

> "Payment by a subsequent purchaser is not the discharge of a burden which the law has placed upon him, *but is actually as well as theoretically a payment of purchase price;* for, after the lien attaches and the taxing authority becomes *pro tanto* an owner of an interest in the property, payment of the tax by a purchaser is nothing but a part of the payment for unencumbered title." (Emphasis added.)

It is true that the *Supplee* case involved a question of deductibility by the purchaser of the amounts paid on account of the vendor's tax liability. Nevertheless, the reasoning in the case, and the basis for the decision, were that the amounts paid by the purchaser constitute part of the purchase price.

If there were any doubt on that score, it is dispelled by *Crane v. Commissioner* (1947), 331 U. S. 1, and *Blackstone Theatre Co. v. Commissioner* (1949), 12 T. C. 801. In the former, the question was as to the basis of real property inherited by the taxpayer from her husband. For Federal estate tax purposes the property had been appraised in the husband's estate at an amount exactly equal to an encumbrance then on it. The taxpayer asserted that her basis was zero, therefore could not be depreciated, and that her basis when she later sold the property (her equity) was zero. However, the Commissioner argued, and the Court held, that the unadjusted basis under section 113(a)(5) of the Internal Revenue Code was the value at the date of the husband's death, without deduction of the amount of the encumbrance.

In the *Blackstone Theatre Co.* case, *supra,* the rules enunciated in *Magruder v. Supplee, supra,* and *Crane v. Commissioner, supra,* were applied under circumstances closely resembling those of the present case. There the taxpayer bought improved real property which was subject to tax liens in the sum of $120,950.03, representing unpaid real property taxes and penalties for prior years. In a subsequent year the taxpayer bid in, for approximately $50,000, the tax liens, and thereby eliminated them. The taxpayer also paid legal fees of $10,000 and $3,000 for title fees in connection with the matter. The question presented to the Tax Court was whether the full amount of the tax liens, or only the amount later paid by the taxpayer to acquire them, should be included in the unadjusted basis of the property. In holding that the full amount of the tax liens should be so included, the Tax Court said (12 T. C. 804):

> "Whatever vitality respondent's present position, or a sterner one he asserts he may have taken, may have had before the Supreme Court spoke in *Crane v. Commissioner,* 331 U. S. 1, it can not now be said to have survived the broad sweep of that decision. From *Crane* we can deduce the following applicable principles: (a) The basis for given property includes liens thereon, even though not personally assumed by the taxpayer; and (b) the depreciation allowance should be computed on the full amount of this basis. These principles, we believe, are controlling in this proceeding, and should be dispositive of the one litigated issue presented."

Thus, the cited cases establish the rule on which the taxpayer here relies.

It will be noted also that the *Blackstone Theatre Co.* case recognizes that expenses (legal fees and title fees) incurred in the acquisition of property are part of the *cost* thereof. Therefore, the case is authority that the other amounts here involved (the commission paid on the exchange, the escrow fees, recording fees, the commissions paid to real estate agents and fees for drawing and recording deeds) were all capital expenditures in the acquisition of the properties. They were amounts paid for increasing the capital value of the properties, and were not deductible. Reg. 111, Sec. 29.24-2. Moreover, the improvement assessment [R. 48, 49] was part of the substituted basis of a property exchanged, and so was a part of the basis of the property sold by virtue of section 113(a)(6) of the Internal Revenue Code. As such, it was a capital expenditure. *Champion Coated Paper Co.* (1928), 10 B. T. A. 433.

The appellant states (App. Br. 5) that "the charges other than taxes which the taxpayer deducted in the earlier years were rightfully deducted by the taxpayer, and the taxes were deducted by the taxpayer and allowed by the Commissioner under color of right and under what was then believed to be the applicable law." At no point in its brief does the appellant point out under what theory of law the charges, other than taxes, were rightfully deducted. The cases and regulations hereinabove referred to in connection with said charges establish clearly that the taxpayer made a mistake of law in deducting said charges. The Commissioner made a mistake of law in allowing them to be deducted.

Neither is there any support in the appellant's brief or elsewhere for the allegation that the taxes were deducted and allowed under color of right. It is true that both the taxpayer and the Commissioner were guilty of a mistake of law in the deduction and allowance of the tax payments; but the taxpayer had no right, colorable or otherwise, to deduct those payments, as the cited cases clearly show.

Elsewhere in its brief (App. Br. 13), appellant states that the taxpayer, in deducting the taxes and other charges from its income during the earlier years, was exercising what amounted to an election to make such deductions. If there were any such election available to a taxpayer, it would seem that the United States Supreme Court would have recognized it in the *Supplee* case, *supra,* where the right to the deduction was directly in issue. The appellant throughout its brief has confused the issue. It fails to distinguish between those costs and charges as to which there is no election, and taxes *and other carrying charges,* liability for which is incurred *after* acquisition of the property, as to which a specific election to capitalize is afforded by section 24(a)(7) of the Internal Revenue Code.

An election is available where a taxpayer has a choice of two legal methods of computing his tax. Having elected one of the legal methods, he is not permitted to change his mind to the detriment of the revenue. *Ross v. Commissioner* (C. A. 1, 1948), 169 F. 2d 483. No election was available, under the facts of this case, to deduct expenditures which were capital expenditures. The deductions taken were purely the result of a mutual mistake of law on the part of the taxpayer and the Commissioner.

Taxes and other carrying charges which are contemplated by the "but" clause of section 113(b)(1)(A) (upon which appellant rests its argument) are necessarily the taxpayer's own taxes, because only his own taxes are a carrying charge and only his own taxes would be deductible if he elected not to capitalize them. The "but" clause exists only because, under section 24(a)(7) of the Internal Revenue Code and Reg. 111, section 29.24-5, some taxes and carrying charges may be capitalized at the taxpayer's election. In order that there be an election, however, the taxes or carrying charges must otherwise be properly deductible. The cited section of the regulations provides in part that:

> "In accordance with section 24(a)(7), items enumerated in section (b) of this section may be capital-

> ized at the election of the taxpayer. Thus, taxes and carrying charges with respect to property, of the type described in this section, are chargeable to capital account at the election of the taxpayer, *notwithstanding that they are expressly deductible under section 23.* No deduction is permitted for any items so treated." (Emphasis added.)

The regulation then goes on to describe the types of taxes and carrying charges which may be deducted and concludes in subparagraph (4) with the following:

> "Any other taxes and carrying charges with respect to property, *otherwise deductible,* which, in the opinion of the Commissioner are, under sound accounting principles, chargeable to capital account." (Emphasis added.)

But a vendor's taxes, when and if paid by the vendee, are not deductible by the vendee under section 23, because to him they are part of the payment for unencumbered title. *Magruder v. Supplee, supra.* All of the items in dispute here were obligations incurred by the taxpayer at the time of purchase pursuant to the contracts of purchase, so that by their very nature they are not carrying charges and the election referred to by appellant was not available.

Appellant argues that a statutory prohibition against double deductions exists by virtue of language contained in Reg. 111, section 29.113(b)(1)-1. Similar language has been contained in prior regulations, and, argues appellant, has received Congressional approval by virtue of re-enactments of section 113(b)(1)(A) of the Revenue Acts. (App. Br. 11, 12.) The regulatory language quoted by the appellant is in that portion of the regulations dealing with general rules affecting adjusted basis. It has already been pointed out that this case does not present a question of adjustments to basis, but, rather, the determination of unadjusted basis under section 113(a) of the Internal Revenue Code.

Apparently the appellant would ask this Court to apply the general language of the regulation quoted at page 11 of its brief as an administrative nullification of the statute of limitations. In this appellant goes too far. Many decisions state the principle that the law does not contemplate the adjustment of an incorrectly computed tax by the incorrect computation of another tax. *Union Metal Manufacturing Co.* (1925), 1 B. T. A. 395; *Streckfuss Steamers, Inc.* (1952), 19 T. C. 1. Under our system of federal taxation, tax liability is determined on an annual or periodic basis. An error made in computation of tax for one year cannot be corrected by an erroneous computation in a later year. *John B. Hollister* (1941), 44 B. T. A. 851; *Estate of William Steele* (1936), 34 B. T. A. 173. The rule sometimes works against the Government and sometimes against the taxpayer. However, it is conducive to orderly administration of the tax laws and must be observed no matter who suffers from its application.

Congress has mitigated the effect of the statute of limitations in certain circumstances by the enactment of section 3801 of the Internal Revenue Code. That section permits adjustment of errors committed in earlier years, in spite of the statute of limitations, where, in specified situations, an item has been treated inconsistently. But by its own terms section 3801 preserves the bar of the statute of limitations as to all such inconsistencies which occurred in taxable years prior to 1932. Here the original error occurred long prior to 1932. Moreover, the adjustment permitted by section 3801 is not effected by an incorrect computation of tax in the later year, but by opening the earlier, and otherwise barred, year to a correct computation of liability for said year.

In a further attempt to support its argument that the taxpayer is here seeking an improper double deduction, or its equivalent, the appellant cites four cases (App. Br. 13, 14), none of which is in point. In *Ilfeld Co. v. Hernandez* (1934), 292 U. S. 62, the taxpayer attempted to deduct, during a period in which it filed a consolidated return with other corporations, a loss alleged to have been sustained upon the dissolution of two subsidiaries which were members of the consolidated group. The Revenue Act of 1928, under which the case arose, authorized the Commissioner to prescribe regulations governing consolidated returns; and further provided that the filing of a consolidated return by an affiliated group constituted consent to such regulations. The regulations issued by the Commissioner under that authority expressly provided that gains or losses would not be recognized upon a distribution during a consolidated return period by one member of the consolidated group to another in cancellation or redemption of its stock. The case merely holds that the first deduction (operating losses sustained by the subsidiaries prior to the dissolution) was proper; the second deduction allegedly sustained upon dissolution of the subsidiaries, and attributable to the prior operating losses, was forbidden by duly authorized regulations covering consolidated returns, to which regulations the taxpayer had expressly consented.

Central Real Estate Company v. Commissioner (C. A. 5, 1931), 47 F. 2d 1036, presented a case in which the taxpayer had, in years subsequent to the acquisition of property, deducted taxes and other carrying charges in computing its taxable net income for such years. As the appellant admits (App. Br. 14), said deductions were rightfully claimed and allowed in the earlier years. When the property was sold by the taxpayer in a later year, the previously deducted taxes and other carrying charges were included in the adjusted basis, the taxpayer relying upon a provision of the then existing regulations of the Commissioner (Reg. 69, Art. 1561) that such expenditures must be capitalized. The Court of Appeals for the Fifth Circuit ruled that said regulation was invalid insofar as it required or permitted capitalization of taxes or other carrying charges which had been properly deducted from income in prior years. In the present case, as has been pointed out, the deductions in the prior years were improperly claimed; and they were not taxes or other carrying charges.

Comar Oil Co. v. Helvering (C. A. 8, 1939), 107 F. 2d 709, involved a deduction in an earlier year pursuant to a method of inventory valuation claimed by the taxpayer and allowed by the Commissioner. The Court refused to allow the taxpayer to take an identical deduction in a subsequent year, and held the taxpayer to a consistent use of the chosen method. The Court relied upon the doctrine of estoppel, saying:

> "It [the taxpayer] is not entitled to a second deduction for the same identical loss, even though the loss was not realized in the year the deduction was

> granted, because it not only approved the premature allowance of the deduction, but it claimed it and induced the Commissioner to grant it."

Reliable Incubator & Brooder Co. v. Commissioner (1946), 6 T. C. 919, was likewise decided against the taxpayer upon equitable principles. In that case, the taxpayer sought the deduction, in the taxable year, of the same items which it had deducted, and had induced the Commissioner to allow, in earlier years.

There is another reason why the appellant's argument concerning double deductions must fail. The reason is that this is not a case involving double deductions. Only one deduction was claimed here, albeit improperly—the deduction in the years of acquisition of the properties. In 1944 and 1945, the years of sale, no *deduction* of the taxes and other capital expenditures was claimed. The taxpayer merely included in its cost, or unadjusted basis, the full amount which it had originally expended in the acquisition of title. In so doing the taxpayer was not claiming a deduction under section 23 of the Internal Revenue Code. It was computing its cost under section 113(a), so that the amount of gain or loss could be determined as required by law.

In this aspect the case is similar to *Salvage v. Commissioner* (C. A. 2, 1935), 76 F. 2d 112. In that case Salvage had purchased shares of a corporation at a cash price substantially less than their then fair market value. Concurrently he executed an agreement never to enter into a business in competition with that of the corporation. However, he did not report any income from the favorable purchase. On a sale of the shares in a later year he claimed as his cost the fair market value of the shares when he had received them, notwithstanding his failure to report any income at the time of acquisition. The Commissioner objected, claiming estoppel. The Court of Appeals rejected the Commissioner's argument, saying (p. 114):

> "So far as appears the petitioner's failure to report the income in 1922 was due to an innocent mistake of law; he made no false representation of fact, and may, for all that this record discloses, have mentioned the purchase in his 1922 return. Under such circumstance we cannot find any adequate basis for an estoppel. . . . Hence the fact that neither the petitioner nor The Viscose Company reported the sale of stock at less than its value as constituting income to the petitioner in 1922 is not material to the present issue, even though it may now be too late for the government to assess an income tax for that year."

The Supreme Court affirmed the decision of the Court of Appeals. *Helvering v. Salvage* (1936), 297 U. S. 106. The analogy between the cited decision and the present case is obvious, for although the *Salvage* case involved an improper *exclusion* from income, rather than an improper deduction, in the earlier year, the determination of cost for purposes of the later sale had to be made upon application of correct legal principles.

Appellant does not contend that the taxpayer in the present case is estopped, or otherwise equitably precluded, from doing as it did. Appellant's argument rests entirely upon a misconception of the legal principle expressed in section 113(b)(1)(A). The consequence of appellant's argument would be to permit it to keep the taxpayer's overpayments for 1944 and 1945, totalling in excess of

$4,000.00, exclusive of interest, to cover the taxes for the years 1923 through 1928 amounting to approximately $1,000.00 which it lost as a result of its own mistake of law. In so attempting, the appellant seeks to brush aside the bar of the statute of limitations in a case in which it was not misled, but rather misunderstood and misapplied the law.

Conclusion.

The judgment of the District Court was correct and should be affirmed.

Respectfully submitted,

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Dated: June 24, 1953.

APPENDIX.

Applicable Statutory Provisions.

Internal Revenue Code:

Section 111(a):

"COMPUTATION OF GAIN OR LOSS.—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized."

Section 113(a):

"BASIS (UNADJUSTED) OF PROPERTY.—The basis of property shall be the cost of such property; * * *."

Section 113(b):

"ADJUSTED BASIS.—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided."

Section 113(b)(1):

"GENERAL RULE.—Proper adjustment in respect of the property shall in all cases be made—

(A) For expenditures, receipts, losses, or other items, properly chargeable to capital account, but no such adjustment shall be made for taxes or other carrying charges, or for expenditures described in section 23(bb), for which deductions have been taken by the taxpayer in determining net income for the taxable year or prior taxable years;

* * * * * * * *"